

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Gregory Green,)	C/A No. 0:08-3254-RBH
)	
Petitioner,)	
)	ORDER
vs.)	
)	
Raymond Reed, Warden,)	
)	
Respondent.)	
_____)	

The Plaintiff, *pro se*, instituted this action pursuant to 28 U.S.C. § 2254 on September 26, 2008. He is incarcerated in the SCDC at Manning Correctional Institution.

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., this matter was referred to United States Magistrate Judge Joseph R. McCrorey, for pretrial handling. The matter is before this Court on the Report and Recommendation of Magistrate Judge McCrorey, which was issued on October 6, 2008. After analyzing the issues presented in this case, the Magistrate Judge recommended that this Court dismiss the petition without prejudice without requiring the respondent to file a return on the basis of the petitioner's failure to exhaust his state court remedies. The plaintiff filed objections to the Report on October 15, 2008 and October 24, 2008.

The Magistrate Judge makes only a recommendation to the Court, to which any party may file written objections. The Court is not bound by the recommendation of the Magistrate Judge but, instead, retains responsibility for the final determination. *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is required to make a *de novo* determination of those portions of the Report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review,

under a *de novo* or any other standard, the factual or legal conclusions of the Magistrate Judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the Magistrate Judge's findings or recommendations. 28 U.S.C. § 636(b)(1).

The Magistrate Judge recommended a finding that the petitioner has failed to exhaust his state remedies because his Petition for Certiorari from the denial of his post-conviction relief application is still pending before the South Carolina Court of Appeals. Petitioner contends in his objections that, by filing his Petition and a *Johnson*¹ brief, he has **sought** discretionary review and that he has therefore exhausted his state court remedies.

Contrary to the argument by the petitioner, in order to exhaust state court remedies, it is necessary for relief to be denied by the state court. *See* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that– (A) the applicant has exhausted the remedies available in the courts of the State . . .") and 28 U.S.C. § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."). Petitioner has indicated that his petition for certiorari is still pending in state court. Therefore, the case must be dismissed without prejudice for failure to exhaust.

¹ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988)(allowing withdrawal of counsel in meritless appeals of PCR actions by following proper procedure).

The Court has reviewed the Petition, Report and Recommendation by the Magistrate Judge, the applicable law, and the petitioner's objections. On the basis of the authorities cited by the Magistrate Judge and this Court's review of the record, the Court overrules all objections, adopts the Report of the Magistrate Judge, and incorporates it into this Order by reference.

The Petition is dismissed without prejudice and without issuance and service of process.

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

October 31, 2008
Florence, South Carolina